STATE OF MICHIGAN

COURT OF APPEALS

ABIGAIL GATH, individually, and as the personal representative of the estate of TIMOTHY JAMES GATH, Plaintiff-Appellant,	UNPUBLISHED March 21, 2006
v	No. 266100 Bay Circuit Court
BAY AUTO AUCTION LLC, Defendant-Appellee.	LC No. 04-003263-NO

Before: Smolenski, P.J., Whitbeck, C.J., and O'Connell, J.

PER CURIAM.

In this wrongful death action, plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). We affirm.

Timothy Gath worked as a driver and mechanic for his father's two companies, James Gath Trucking and J & M Repair. Gath Trucking was hired to pick-up and transport three vehicles to defendant Bay Auto Auction LLC for eventual sale at auction. On the evening of March 3, 2004, Gath transported the vehicles to defendant's property and left them there overnight. The next day, he returned to defendant's property to unload the vehicles.

Gath apparently unloaded the first two vehicles, a pickup truck and a utility truck, without incident. However, the third vehicle, a commercial van, was positioned on an incline on the flatbed, which exerted tension on the chains used to secure it. In order to release this tension, Gath apparently secured a chain to the axle of the van and to the trailer-hitch of the utility truck that had already been unloaded. The utility truck was then used to pull the van and, thereby, loosen the chains securing it.

At some point, one of defendant's employees, Christopher Snarey, was instructed to move the unloaded vehicles to the area where they would be prepared for sale. Snarey went out to the flatbed trailer and observed the utility truck parked alongside with its motor running. Snarey saw Gath standing on the flatbed between the front left corner of the van and the cab of the semi-tractor. Snarey stated that he asked Gath, "Are we all set?", to which Gath replied, "Yes." Snarey then got into the truck and attempted to move it. Snarey said that, when he attempted to move the truck, there was a jerk and the utility truck stopped. Snarey got out of the

truck and walked around to the back where he saw that the truck was attached to the van by a chain. Snarey also saw Gath pinned between the cab of the semi-tractor and the front of the van, which had been pulled up the incline of the trailer and off the bed. Snarey immediately called for help, but emergency personnel were unable to help Gath, who was pronounced dead at the scene.

Plaintiff commenced the present action on April 13, 2004. On June 2, 2005, defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). The trial court determined that plaintiff failed to present evidence that defendant had a duty to train its employees to load and unload trailers or that its employees had a duty to examine unloaded vehicles for connected chains prior to moving them. The trial court further determined that plaintiff failed to present any evidence that Snarey knew or should have known of the chain connecting the utility truck and the van and, in the absence of such knowledge, failed to present evidence of negligent conduct on the part of defendant's employee. For these reasons, on August 29, 2005, the trial court granted defendant's motion for summary disposition. Thereafter, plaintiff filed a motion for reconsideration, which was denied on October 10, 2005. This appeal followed.

This Court reviews de novo the trial court's decision whether to grant summary disposition. *Moore v Cregeur*, 266 Mich App 515, 517; 702 NW2d 648 (2005). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim.[1] *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is appropriate under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." When determining whether there is a genuine issue as to any material fact, the trial court must consider the evidence presented by the parties in the light most favorable to the party opposing the motion. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003), citing *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 609; 566 NW2d 571 (1997). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

On appeal, plaintiff first argues that Snarey's statements to trooper Drew Patterson on the day of the accident, as recorded in Patterson's incident report, are admissible as substantive evidence that Snarey actively participated in the unloading of the vehicles with Gath and knew about the chain connecting the utility truck to the van. Therefore, plaintiffs conclude, there is a

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[1] While the trial court did not clarify whether the motion was granted pursuant to MCR 2.116(C)(8) or (C)(10), it is evident that the trial court looked beyond the pleadings in making its determinations, hence, this Court will consider the motion granted pursuant to MCR 2.116(C)(10). *DeHart v Joe Lunghamer Chevrolet, Inc*, 239 Mich App 181, 184; 607 NW2d 417 (1999).

fact question concerning whether Snarey's operation of the utility truck without first ensuring that the chain was disconnected amounted to negligent conduct. We disagree.

When reviewing a motion for summary disposition, the reviewing court may only consider the "substantively admissible evidence actually proffered in opposition to the motion." *Id.* at 121. Except as provided by court rule, hearsay is not admissible. MRE 802. Hence, if Patterson's incident report constitutes inadmissible hearsay, it cannot be used as substantive proof of Snarey's knowledge and actions.

Trooper Patterson interviewed Snarey on the day of the accident.[2] In his incident report, Patterson wrote the following concerning the interview:

> Christopher Snarey was located inside the office area of the business. He was visibly distraught over the incident. I was able to gather the following information from Snarey.
>
> Snarey advised that he was assisting with the off loading of the three vehicles from the semi-trailer. They had removed two of the vehicles and only the Dodge van remained on the trailer.
>
> They brought the 1992 Ford utility truck up alongside the semi-trailer (driver[']s side). They hooked a chain from the Ford to the Dodge Van on the trailer to assist in taking the tension off the tie down chains.
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> Snarey was operating the Ford. The victim Gath was up on the front of the semi-trailer removing the tie down chains. The chains were apparently removed. Snarey said he hollered to Gath "Are we all set?" To which he said Gath replied "yes".
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> Snarey indicated that he was going to drive the Ford utility vehicle to a parking area on the auction grounds. When he started forward in the vehicle he said he felt the vehicle "jerk". He stopped the vehicle and exited the cab. It was at this time that he discovered that Gath was pinned by the dodge van. Snarey immediately called for assistance.
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> **Note: Snarey was very distraught over the incident. The investigator did not question him at length at this time. Snarey will be contacted at a future date/time for a more thorough interview.**

[2] Patterson interviewed Snarey again on March 12, 2004 and filed a supplemental report based on this interview on March 16, 2004. According to the supplemental report, Snarey stated that he did not help Gath unload the vehicles and was unaware that the utility vehicle was connected to the van by a chain until after the accident.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Because the incident report was an out of court statement, MRE 801(a), offered in evidence to prove the truth of the matter asserted, it falls within the definition of hearsay. MRE 801(c). Therefore, in order to be considered, it must fall under one of the hearsay exceptions. Furthermore, when the document to be admitted contains a second level of hearsay, that hearsay must also qualify under an exception before being admissible. MRE 805; *Maiden*, *supra* at 125, citing *Merrow v Bofferding*, 458 Mich 617; 581 NW2d 696 (1998); *Hewitt v Grand Trunk W R Co*, 123 Mich App 309, 315-316; 333 NW2d 264 (1983).

We shall assume that the incident report itself is admissible hearsay.[3] However, because the incident report contains out of court statements, purportedly made by Snarey, which plaintiff offers for the truth of the matters asserted, these statements would be barred as hearsay within hearsay unless the statements are specifically excluded from the definition of hearsay, see MRE 801(d), or fall under an applicable hearsay exception. MRE 805. On appeal, plaintiff argues that these statements are not barred by the hearsay rule. Plaintiff contends that the statements are the admissions of a party-opponent and, therefore, are specifically excluded from the definition of hearsay. See MRE 801(d)(2)(D). Plaintiff further argues that the statements are admissible under the present sense exception, MRE 803(1), the exception for excited utterances, MRE 803(2), and for impeachment purposes under MRE 806. We disagree.

In order for the statements allegedly made by Snarey to be admissible as the admissions of a party opponent under MRE 801(d)(2)(D), the statements must be "by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship . . . ." While there is no dispute that Snarey was defendant's agent or servant at the time of the accident, there is significant evidence that the statements recorded in the incident report, which were attributed to Snarey, were not actually made by Snarey. If the statements recorded in the incident report were not actually made by Snarey, these statements would not be by defendant's "agent or servant", and, therefore, would not constitute the admission of a party opponent under MRE 801(d)(2)(D). *Merrow*, *supra* at 633 ("A statement cannot be used as a party admission unless the party made the statement.").

Plaintiff, as the proponent of these statements, bears the burden of establishing their relevance and admissibility. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004). In order to meet this burden, plaintiff must establish that the statements contained within the incident report meet the requirements of MRE 801(d)(2)(D) by a preponderance of the evidence. *People v Vega*, 413 Mich 773, 782; 321 NW2d 675 (1982) (applying the preponderance of the evidence standard to preliminary admissibility questions under MRE 104); *Merrow*, *supra* at 633 n 14 (noting that the proper standard for admissibility is preponderance of the evidence). One such requirement is that the statements contained within the incident report

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[3] We are cognizant of the prohibition stated in MCL 257.624 against the use of police accident reports in court actions. See *Webster v Central Paving Co*, 51 Mich App 62, 65; 214 NW2d 707 (1974). However, because it is not necessary to resolution of this issue, we decline to address whether MCL 257.624 properly applies to the incident report at issue.

were in fact made by defendant's agent or servant. MRE 801(d)(2)(D). Aside from the March 4, 2004 incident report itself, there is no evidence that Snarey actually made the statements attributed to him in the incident report. In contrast, there is significant evidence that the statements attributed to Snarey in the incident report did not have their origin with Snarey.

At his deposition, Patterson stated that Snarey was hysterical on the day of the accident. Patterson explained that, during his initial interview, Snarey was only able to provide bits and pieces of information. Patterson further testified that many of the statements attributed to Snarey in his initial incident report were actually based on pieces of information gathered from several sources coupled with assumptions that he had made. For example, Patterson explained that Snarey did not actually state that he was aware of the chain connecting the utility truck and the van.

> It was an assumption on my part. As I stated earlier, that is an inaccurate statement in the report. It is put there based upon bits and pieces initially learned at the scene, upon the investigation, it was later found out not to be an accurate statement, and I say that is not an accurate statement.

Patterson also stated that he assumed that Snarey had helped Gath unload the vehicles, but later learned that the vehicles had already been unloaded when Snarey arrived to move them to another location. In addition, at his deposition, Snarey denied that he helped Gath unload the vehicles on the day of the accident and denied having any knowledge that the van was connected to the utility truck by a chain until after the accident.

Even assuming that the incident report in question could be employed as evidence that Snarey made the statements attributed to him, see *Merrow*, *supra* at 633 n 14, it is insufficient to overcome Patterson's testimony that Snarey did not make the statements and Snarey's own testimony that he did not help unload the vehicles and was not initially aware of the chain connecting the van and the utility truck. Thus, it cannot be established by a preponderance of the evidence that the statements attributed to Snarey in the incident report of March 4, 2004 were the admissions of a party opponent. MRE 801(d)(2)(D); *Merrow*, *supra* at 633. Likewise, because plaintiff cannot establish that Snarey actually made the statements attributed to him, plaintiff cannot establish that the statements were made while perceiving an event or condition, or immediately thereafter, or while under the stress or excitement of a startling event or condition. Hence, plaintiff cannot establish that the statements are admissible under the present sense impression and an excited utterance exceptions. See MRE 803(1) and MRE 803(2). Finally, MRE 806 is not an exception to the application of the prohibition against the admission of hearsay, but rather permits a party to attack the credibility of the declarant of admitted hearsay with "any evidence which would be admissible for those purposes if declarant had testified as a witness." Consequently, the statements attributed to Snarey in the incident report of March 4, 2004, are inadmissible hearsay.

In order to establish a prima facie case of negligence, "a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). On appeal, plaintiff contends that defendant can be held vicariously liable for Snarey's negligence. Specifically, plaintiff argues that Snarey had a duty to operate the utility truck with ordinary care, a duty to inspect the utility truck for connected chains, and a duty to unload the

vehicles with ordinary care, which duties he breached by operating the utility truck without first ensuring that the chain was no longer attached.

Without the March 4, 2004 incident report, plaintiff cannot establish that Snarey knew or should have known that the utility truck was connected to the van by a chain. Further, there is no evidence that the chain was still taut when Snarey approached the utility truck. Plaintiff also failed to present evidence that the chain pictured in the back of the utility truck was the same chain used to pull the van. Consequently, plaintiff's argument that the chain must have been plainly visible is mere speculation incapable of creating a fact question. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 192-193; 540 NW2d 297 (1995). Without evidence that Snarey knew or should have known about the chain, plaintiff cannot establish that Snarey breached his duty to exercise ordinary care in the operation of the utility truck.[4]

Likewise, without the incident report, plaintiff cannot establish that Snarey undertook to assist Gath with the unloading of the vehicles. Indeed, plaintiff failed to present any evidence to contradict defendant's evidence that it had a policy prohibiting its employees from assisting with the loading and unloading of vehicles.[5] Although Gath's father stated that defendant's employees might lend a hand if asked, he also testified at his deposition that he would normally unload the vehicles and that he had no recollection of any of defendant's employees ever helping him actually unload a vehicle. Because there is no evidence that Snarey undertook to assist Gath with the unloading of the trailer, he could not have breached the applicable duty.[6]

Finally, plaintiff failed to establish that Snarey had a duty to inspect the utility truck for connected chains prior to attempting to move it. One would not normally expect a vehicle to be connected to another by a chain and, therefore, in the absence of knowledge that would place a reasonably prudent person on notice that chains were routinely connected to unloaded vehicles, there would be no duty to inspect for the presence of chains. In this case, plaintiff did not present any evidence that chains had been used to tow vehicles on defendant's property in the past or that defendant or its employees knew or should have known of the practice. Therefore, Snarey did not have a duty to inspect the utility truck for chains before moving it.

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[4] This is consistent with *Bonin v Gralewicz*, 378 Mich 521; 146 NW2d 647 (1966). Unlike this case, in *Bonin*, the evidence was sufficient for a jury to conclude that the defendant should have known that a child could have come outside and got behind his car in the time that it took him to walk to it. Consequently, the jury could have found that the defendant had a duty to inspect for the presence of children before backing up his car. *Id.* at 526-527.

[5] Furthermore, we do not agree with plaintiff's contention that Snarey's question, "Are we all set?", supports an inference that Snarey helped Gath unload the vehicles or otherwise was aware of the chain.

[6] We also reject plaintiff's contention that defendant had a duty to assist or undertake the unloading of the vehicles brought to its property. Plaintiff failed to cite any authority or proffer any reason for the imposition of such a duty, therefore, this issue was abandoned on appeal. *People v Van Tubbergen*, 249 Mich App 354, 365; 642 NW2d 368 (2002) ("Issues insufficiently briefed are deemed abandoned on appeal.")

Because plaintiff failed to present evidence from which a jury could conclude that Snarey breached an applicable duty owed to Gath, plaintiff cannot establish that Snarey engaged in negligent conduct and, consequently, plaintiff's vicarious liability claim must fail. We also reject plaintiff's argument that defendant could be liable under MCL 257.401(1). Even if defendant owned the vehicles involved, MCL 257.401(1) only imposes liability on the owner of the vehicle "for an injury caused by the negligent operation of the motor vehicle . . . ." Because plaintiff failed to establish that the utility truck was negligently operated, there can be no owner's liability.

Once defendant made a properly supported motion for summary disposition under MCR 2.116(C)(10), plaintiff was obligated "to rebut with documentary evidence defendant's contention that no genuine issue of material fact existed." *Quinto v Cross & Peters Co*, 451 Mich 358, 371; 547 NW2d 314 (1996). Because plaintiff failed to present admissible evidence creating a material fact question concerning whether defendant's employee's conduct amounted to negligence, summary disposition was appropriate.

Affirmed.

/s/ Michael R. Smolenski
/s/ William C. Whitbeck
/s/ Peter D. O'Connell